



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Ms. Cathy B. Campbell
Director, Legal Services
Texas Department of Mental Health
and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR95-1617

Dear Ms. Campbell:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32290.

The Texas Department of Mental Health and Mental Retardation ("TDMHMR") has received several requests for information regarding electroconvulsive therapy ("ECT"). TDMHMR is concerned that some of the requested information is confidential under several provisions of the Health and Safety Code, namely sections 576.005, 578.008, and 611.002, which are incorporated into the act by section 552.101 of the Government Code.¹

We begin with a discussion of the statutory provisions at issue. Sections 578.006 and 578.007 of the Health and Safety Code require mental hospitals and facilities that administer ECT to register ECT equipment with TDMHMR and to submit quarterly reports to TDMHMR. Section 578.008 requires TDMHMR to file an annual report with the governor and the legislature

¹You also cite TDMHMR regulations regarding the disclosure of patient-identifying information. See 25 T.A.C. §§ 403.291 - .308. These regulations appear to be cumulative of sections 576.005 and 611.002 of the Health and Safety Code. To the extent they are not, they exceed TDMHMR's rulemaking authority and are unenforceable. See Open Records Decision No. 594 (1991) at 3 (governmental body may not enact rule making information confidential unless it has statutory authority to do so).

summarizing by facility the information received under Sections 578.006 and 578.007. If the therapy is administered by a private physician on an outpatient basis, the report must include that information but may not identify the physician. The department may not directly or indirectly identify in a report issued under this section a patient who received the therapy.

Health & Safety Code § 578.008(b). The language in section 578.008(b) providing that the report may not identify a patient who has received ECT or physician who has administered ECT on an outpatient basis on its face applies only to the TDMHMR report to the governor and the legislature and does not apply to the release of other information by TDMHMR.

Section 611.002(a) of the Health and Safety Code provides that “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Confidential records and communications may only be released as provided by section 611.004 and 611.0045. *Id.* § 611.002(b). Section 611.004, which is the more relevant for our purposes, provides as follows:

(a) A professional may disclose confidential information only:

(1) to a governmental agency if the disclosure is required or authorized by law;

(2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient;

(3) to qualified personnel for management audits, financial audits, program evaluations, or research, in accordance with Subsection (b);

(4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient’s personal affairs;

(5) to the patient’s personal representative if the patient is deceased;

....

(b) Personnel who receive confidential information under Subsection (a)(3) may not directly or indirectly identify or otherwise disclose the identity of a patient in a report or in any other manner.

....

(d) A person who receives information from confidential communications or records may not disclosure the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. This subsection does not apply to a person listed in Subsection (a)(4) or (a)(5) who is acting on the patient's behalf.²

Clearly, subsection (a)(1) of section 611.004, in conjunction with section 578.007, authorizes a mental health facility to release confidential patient information relating to the administration of ECT to TDMHMR. We believe that subsection (d) of section 611.004 applies to TDMHMR³ and controls TDMHMR's subsequent disclosure of such information. Therefore, TDMHMR may not disclose confidential patient information "except to the extent that disclosure is consistent with the authorized purposes for which [it] first obtained the information." *Id.* § 611.004(d).

We must also address whether confidentiality established by section 611.002 survives the death of a patient. Common-law and constitutional privacy rights lapse upon the death of the subject. Attorney General Opinion H-917 (1976) at 3-4; Open Records Decision No. 272 (1981) at 1. Whether confidentiality established by a particular statute survives the death of the subject, however, depends upon the particular statute. Attorney General Opinion DM-61 (1991). Based on subsection 611.004(a)(5) which gives the personal representative of a deceased patient a right of access to confidential patient information, we believe that the legislature intended the confidentiality established by section 611.002 to survive the death of a patient.

Chapter 576 of the Health and Safety Code sets forth the right of mental health facility patients. Section 576.005(a) provides as follows:

Records of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.

²Section 611.004(a) was amended by the Seventy-fourth Legislature. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 865, § 8, 1995 Tex. Sess. Law Serv. 4295-96. These amendments apply to the disclosure of health care information, medical records, and mental health care information on or after January 1, 1996. *Id.* § 11, 1995 Tex. Sess. Law Serv. 4297. The amendments to section 611.004(a) do not, however, affect our analysis regarding the release to the requestor of the information at issue.

³Section 611.004(d) applies to "[a] person who receives information from confidential communications or records." The term "person" includes a governmental agency. *See* Gov't Code § 311.005(2). Neither subsection (a)(4) or (a)(5) applies to TDMHMR.

Subsection (b) of section 576.005 permits release of records to a law enforcement officer or the patient's legally authorized representative. Unlike section 611.004, section 576.005 contains no express limitations on subsequent disclosures by persons who may receive confidential information as "permitted by other state law" under subsection (a) or under subsection (b).

Having examined the relevant statutes, we apply them to the documents at issue.⁴ We begin with the completed forms entitled "Report of ECT/Other Therapies" (Exhibit D) which TDMHMR describes as follows:

These reports include the name of the treating physician, the age, sex, race, and other information regarding each client, and the name and location of the facility.

TDMHMR asserts that client-identifying information in these reports is confidential under sections 576.005(a) and 611.002(a).

We have reviewed the reports submitted to this office as Exhibit D. Although they include patient information, they do not reveal patient names or any other identifying information. Therefore, the reports are not "[r]ecords of a mental health facility that directly or indirectly identify" a patient made confidential under section 576.005(a). Furthermore, the reports do not reveal "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional" made confidential under section 611.002(a). TDMHMR has provided no basis for its concern that the identity of a patient could be ascertained using the information in the reports. This possibility seems speculative and remote. For these reasons, we conclude that the reports are not confidential under sections 576.005(a) and 611.002(a).

TDMHMR also asks whether physician information in the reports is confidential under section 578.008(b). As noted above, section 578.008(b) applies only to the TDMHMR report to the governor and the legislature and does not apply to the release of other information by TDMHMR.

In addition, TDMHMR asserts that a summary that "identifies the name of the facility, a contact person at each facility, and the age and cause of death for each client" (Exhibit E) is also confidential. Although this document does not include client names, TDMHMR is concerned that "the information on the reports regarding the client,

⁴We have received or been copied on multiple pieces of correspondence by both TDMHMR and the requestor relating to this ID number. In this ruling, we address the specific documents, identified as Exhibits A through E, and the issues on which TDMHMR appears to have asked us to rule in a letter to this office dated March 17, 1995. We also address one additional document that was provided to this office by TDMHMR and that appears to be related to this ID number.

combined with the name of the physician or contact person and name and location of the facility providing the ECT, could indirectly identify the client receiving services.” This document, which appears to merely summarize information in the reports, does not reveal confidential patient information for the same reason that the reports do not reveal confidential patient information and is not confidential under sections 576.005(a) and 611.002(a).

TDMHMR asserts that several memorandums written by the TDMHMR medical director regarding unidentified patients (Exhibit B) are protected under sections 576.005(a) and 611.002(a) because the patients would be identifiable if the memorandums are released with the “ECT/Other Therapy Reports.” It makes a similar argument with respect to certain handwritten notes

that summarize the causes and dates of death of persons who died within fourteen days after receiving ECT Treatment (Exhibit C). Exhibit C also lists the patients’ ages and the names of the facilities that provided ECT. . . . [C]lusters of facts, when taken together, may identify a client served by the Department.

Neither the memorandums nor the notes reveal the identities of particular patients. These documents do not reveal confidential patient information for the same reason that the reports do not reveal confidential patient information. They are not confidential under sections 576.005(a) and 611.002(a). We note that there is a death certificate attached to a memorandum. The death certificate, while not itself confidential under section 611.002(a), identifies the patient discussed in the memorandum. Therefore, all identifying information must be redacted from the death certificate. In addition, included among the documents submitted by TDMHMR is a hospital “Discharge Summary” relating to the patient discussed in the memorandum. This hospital Discharge Summary, unlike the other documents and reports submitted by TDMHMR, identifies a patient and was prepared by a doctor at a mental health facility. Therefore, we believe this document is a record of a mental health facility that directly identifies a patient and is confidential under section 576.005(a). We have marked this document.

TDMHMR asks whether an autopsy report for a client treated with ECT (Exhibit A) is confidential under sections 576.005(a) and 611.002(a). An autopsy report is prepared by a medical examiner. Code Crim. Proc. art. 49.25, § 9. Section 11 of article 49.25 of the Code of Criminal Procedure provides that autopsy reports are public records. *See generally* Open Records Decision No. 529 (1989). We do not believe that an autopsy report is a “[r]ecord[] of a mental health facility” made confidential under section 576.005(a). Furthermore, we do not believe that an autopsy report which is prepared by a medical examiner constitutes a confidential communication or record as defined by section 611.002(a). Therefore, we conclude that the autopsy report itself is not confidential under sections 576.005(a) and 611.002(a). We note, however, that the autopsy report is appended to a “Report of ECT/Other Therapies.” Although the ECT report does not reveal the identity of a patient and therefore does not disclose confidential

patient information, the release of the ECT report in conjunction with the autopsy report, which includes the patient's name, would identify a particular patient with the information in the ECT report and thereby reveal confidential patient information. Therefore, we conclude that the patient's name must be redacted from the autopsy report. The remainder of the autopsy report and the ECT report to which it is attached are not confidential under sections 576.005(a) and 611.002(a).

Finally, TDMHMR asks whether it is required under the act to respond to requests for federal and state statutes, rules, regulations and policy statements regarding the administration of ECT by TDMHMR dating from 1990 to the present. This office addressed a similar request in Open Records Decision No. 563 (1990):

The remaining requests ask for "[d]ocuments showing the authority" of the corporation to perform or engage in various activities. While couched as requests for documents, these are essentially requests for federal and state laws and regulations governing the activities of the corporation and for a statement of the corporation's interpretation of these provisions. The Open Records Act does not require a governmental body to perform legal research for a requestor nor to answer general questions. See Open Records Decision No. 342 (1982).

Open Records Decision No. 563 (1990) at 8. For the reasons stated in Open Records Decision No. 563 (1990), TDMHMR is not required to respond to these requests. It may do so, of course, if it so chooses.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'R. W. Schmidt', with a long horizontal line extending to the right.

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/MRC/rho

Ref.: ID# 32290

Enclosures: Marked documents

cc: Mr. Mark R. Smith
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(w/o enclosures)